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No. 83-1312

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1983

PIPER AIRCRAFT CORPORATION,

Petitioner

v.

SEVEN BAR FLYING SERVICE, INC.,

Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY BRIEF OF PETITIONER PIPER AIRCRAFT CORPORATION

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REPLY[1]

The reply will be organized as follows: (1) Reply To Certain Statements in Respondent's "Statement Of The Case"; (2) Reply To No. 1 of "Reasons For Denying The Petition"; (3) Reply To No. 2 of "Reasons For Denying The Petition"; (4) Reply To No. 3 of "Reasons For Denying The Petition".

1. *Reply To Certain Statements In Respondent's "Statement Of The Case"*

Much of Respondent's "Statement Of The Case" is improper in that it is legal argument. Several statements, however, need to be addressed.

a. In item no. 4, Respondent states that:

> "The reason for admittance of Piper Service Bulletin 527 was not as 'direct proof of a product defect' as asserted by petitioner [pp. 3, 17, 20]." (Brief In Opposition, p. 4)

This statement by Respondent is incredible in light of the express acknowledgment in its "Appellee's Brief" before the Tenth Circuit that "Piper Service Bulletin 527 was offered and admitted under the rationale of *Ault v. International Harvester Company*, 13 Cal. 3d 113, 117 Cal. Rptr. 812, 528 P.2d 1148 (1975)." (See, Petition For Writ of Certiorari, p. 4, n. 1.) It is also incredible in light of the District Court's express statement that it was admitting the bulletin under the rationale of *Ault*. (See, Petition For Writ of Certiorari, pp. 3-4.) Respondent is now apparently attempting to tell this Court that the bulletin was not admitted under *Ault*. Such is a plain and inexplicable refusal to adknowledge what this case is all about as even a cursory reading of the Tenth Circuit's opinion clearly shows.

b. In item no. 5, Respondent discusses feasibility and states that "Piper was given the opportunity to stipulate to... feasibility.... "(Brief In Opposition, p. 4) Petitioner simply

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[1] As new information has been provided to the undersigned counsel regarding the status of Piper Aircraft Corporation pertinent to Supreme Court Rule 28.1, item no. 3 of the "List of Parties" (Petition For Certiorari, p. ii) is withdrawn and the following substituted therefore. Piper Aircraft Corporation is a wholly-owned subsidiary of Bangor Punta Corporation. Bangor Punta Corporation is a wholly-owned subsidiary of Lear-Siegler Corporation. Piper Acceptance Corporation is a wholly-owned subsidiary of Piper Aircraft Corporation.

observes that "opportunity" is not the issue on appeal. The issue is the correctness of the Tenth Circuit's ruling that "[u]nless a manufacturer expressly concedes [feasibility], the manufacturer should be deemed to dispute that fact...." (See, Petition For Writ of Certiorari, pp. 17-18) The language of F.R.E. 407 is clear in *not* requiring such an affirmative concession. See, e.g., *Werner v. Upjohn Co., Inc.*, 628 F.2d 848 (4 Cir. 1980), cert. den. 449 U.S. 1080.

2. *Reply To No. 1 Of "Reasons For Denying The Petition*

In item no. 2, Respondent urges that the petition for rehearing filed by Petitioner in The Tenth Circuit was untimely. This argument is frivolous. Significantly, Respondent attaches no documents as appendices to support the dates recited in this argument. Respondent made a similar argument in the Tenth Circuit in a document entitled "Appellee's Motion To Dismiss Appellant's Petition For Rehearing." Given the fact that the Tenth Circuit heard and denied the petition for rehearing (with one judge voting to grant rehearing—see, Petition For Writ of Certiorari, Appendix, pp. 50-51), it would seem clear that Respondent's argument was rejected. Petitioner submits that this argument should more properly have been raised in a cross-petition for certiorari under Supreme Court Rule 20.5 and that Respondent's failure to do so amounts to a waiver.[2]

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[2] In any event, Respondent cannot prevail on the merits. The petition for rehearing was mailed on September 16, 1983. It apparently did not arrive at the Tenth Circuit in Denver in the due course of the mails until September 19, 1983. Respondent contends that September 16, 1983 was "the final day" for filing the petition. (Brief In Opposition, p. 5) Assuming that to be true, the petition was timely filed. F.R. App. Pro.40(b) provides that the petition "shall be served and filed as prescribed by Rule 31(b) for the service and filing of *briefs.****" (emphasis added) F.R. App. Pro. 25(a) states that "...briefs...shall be deemed filed on the day of mailing...." As the petition was mailed on September 16, 1983, it is deemed timely filed. The "Petition For Rehearing, And Suggestion For Rehearing In Banc" with "Certificate Of Mailing" is attached as Appendix "A", 5-11.

Further, even assuming (without conceding) that the petition was untimely, the Tenth Circuit had the power to consider the petition in any event. See, e.g., *Braniff Airways, Inc. v. Curtiss-Wright Corporation*, 424 F.2d 427 (2 Cir. 1970), cert den. 400 U.S. 829.

3. *Reply To No. 2 of "Reasons For Denying The Petition"*

Respondent claims that Petitioner's asserted conflict over F.R.E. 407 is an exaggeration. Petitioner submits that the cases and other authorities submitted by Petitioner amply support its position of conflict whereas Respondent cites no authority to the contrary. Respondent's attempt to facilely gloss over the differences among the Circuits ignores the fact that the Tenth Circuit expressly acknowledged such differences at various points during the course of its opinion. In particular, in the Appendix to its opinion, the Tenth Circuit explicitly observed that "[s]everal circuits have read Rule 407 to exclude evidence of subsequent remedial measures in strict liability, products manufacturers cases." (See, Petition For Writ of Certiorari, Appendix, p. 44) How Respondent can say that this is not contrary to the Tenth Circuit's holding of admissibility in the instant case escapes Petitioner. Similarly, the Tenth Circuit explicitly acknowledged the "split of authority among state courts, ..." (See, Petition For Writ of Certiorari, Appendix, p. 44)

Petitioner feels very comfortable in asserting the existence of a conflict as to F.R.E. 407.

4. *Reply To No. 3 Of "Reasons For Denying The Petition"*

Petitioner obviously disagrees that "[t]he opinion below was fair, accurate and correct." (Brief In Opposition, p. 7) Respondent is apparently referring to the decision of the District Court. The decision of the District Court was to admit the subsequent remedial measures evidence pursuant to the rationale of *Ault v. International Harvester Company*, supra. Petitioner contends that this was not a correct decision. Being incorrect, it can be neither fair nor accurate. Petitioner further contends that the Tenth Circuit continued the error and compounded it by going beyond the fairly confined decision of the District Court to discuss matters not at issue below.

Once again, Respondent states that "the [District] court never specifically said that 527 was admitted to prove a defect." (Brief In Opposition, p. 8) This incredible statement has already been addressed supra.

CONCLUSIONS

Petitioner disagrees with Respondent's conclusions in their entirety. First, three distinct positions concerning the applicability of F.R.E. 407 to claims sounding in strict liability in tort clearly do exist. Since F.R.E. 407 is an Act of Congress, this is improper. Second, Petitioner has not admitted that the Eighth Circuit has "altered its position such that it is not in conflict." (Brief In Opposition, p. 8) Quite to the contrary, it appears to Petitioner that the Eighth Circuit has the most unworkable scheme of all. Third, Petitioner merely observes that, contrary to Respondent's argument, the Tenth Circuit itself acknowledged that its position differed from that of other Circuits. Indeed, Petitioner feels that the Tenth Circuit, in the sheer scope and audacity of its opinion, went out of its way to invite this Court to review the "hullabaloo" (Brief In Opposition, p. 9) which surrounds F.R.E. 407 nationwide.

Petitioner respectfully requests that the petition for writ of certiorari be granted.

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APPENDIX "A"

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

DORINE HERNDON, Personal
Representative of the Estate
of Charles Herndon, Deceased,
and STELLARETTA O'DONNELL,
Personal Representative of
the Estate of Thomas O'Donnell,
Deceased,

Plaintiffs,

vs. No. 81-1805

SEVEN BAR FLYING SERVICE, INC.,

Plaintiff-in-Intervention
-Appellee,

vs.

PIPER AIRCRAFT CORPORATION,

Defendant-Appellant.

PETITION FOR REHEARING, AND SUGGESTION FOR REHEARING IN BANC

Defendant-Appellant Piper Aircraft Corporation, pursuant to Rule 40 of the Federal Rules of Appellate Procedure, petitions this Court for rehearing of the instant appeal following entry of this Court's Judgment on September 2, 1983. Pursuant to Rule 35 of the Federal Rules of Appellate Procedure, Piper also suggests that a rehearing, if any, be heard in banc. As grounds for its Petition for Rehearing, Piper submits that the Court has overlooked or misapprehended certain points of fact and law in affirming the trial court on the basis of Rule 407 of the Federal Rules of Evidence.

At the trial level, the trial court admitted into evidence, over Piper's objection, Piper Service Bulletin 527 which described a remedial measure to the pitch trim switch of certain aircraft manufactured by Piper. The bulletin was published over a year after the accident in question. This Court affirmed the trial court's judgment solely on the basis of the admissibility of Piper Service Bulletin 527. In so holding, this Court relied upon the following:

(1) Piper did not stipulate to the feasibility of modifying the pitch trim switch;

(2) Rule 407 of the Federal Rules of Evidence, excluding evidence of subsequent remedial measures, is inapplicable in a strict products liability case;

(3) Even if Service Bulletin 527 were excluded under Rule 407, essentially the same evidence would have been presented to the jury through the Federal Aviation Administration's Airworthiness Directives which were admissable under Rule 407.

Contrary to this Court's assertion and its opinion at Page 14, Piper did indeed stipulate to the feasibility of modifying the pitch trim switch. For example, during arguments to the court over the admissibility of Service Bulletin 527, Piper's attorney stated: "Now, the feasibility of change, we haven't denied." [Tr. Vol. II, p. 41]. Piper's attorney also stated: "We haven't denied there is availability..., practicality or technological possibility of such a change." [Tr. Vol. II, p. 44]. Thus, the admission of Service Bulletin 527 does not fall within the exception to Rule 407 which permits the admission of evidence of subsequent remedial measures if feasibility is controverted.

With respect to the Court's decision that Rule 407 does not apply in strict products liability cases, Piper wishes to point out that this Court and the Eighth Circuit Court of Appeals are alone among all the circuits in so deciding. Only the Ninth Circuit has failed to address the issue. *Longenecker v. General Motors Corporation*, 594 F.2d 1283 (9th Cir. 1979). All others except the First Circuit have explicitly held that Rule 407's exclusionary principles apply with equal force in strict products liability cases. *Cann v. Ford Motor Company*, 658 F.2d 54, 60 (2nd Cir. 1981), *cert. den'd*, 456 U.S. 960 (1982); *Josephs v. Harris Corporation*, 677 F.2d 985, 991 (3rd Cir. 1982); *Werner v. Upjohn Company, Inc.*, 628 F.2d 848, 856-858 (4th Cir. 1980), *cert. den'd*, 449 U.S. 1080 (1981); *Grenada Steel Industries, Inc. v. Alabama Oxygen Company, Inc.*, 695 F.2d 883, 885-889 (5th Cir. 1983); *Hall v. American Steamship Company*, 688 F.2d 1062, 1066-1067 (6th Cir. 1982); *Oberst v. International Harvester Company, Inc.*, 640 F.2d 863, 866 (7th Cir. 1980). Although the *Werner* case dealt with a drug manufacturer's failure to warn, the holding in that case was not limited to its facts.

In addition to the six circuits listed above which have found Rule 407 to be applicable in strict products liability cases, the First Circuit Court of Appeals has indicated that it will follow the clear majority rule. In *Roy v. Star Chopper Company, Inc.*, 584 F.2d 1124, 1134 (1st Cir. 1978), *cert. den'd*, 440 U.S. 916 (1979), the court summarily affirmed the trial court's exclusion of evidence under Rule 407 in a case submitted to a jury under strict liability only. Subsequently, the First Circuit noted in dictum that "post-manufacture evidence cannot be used to prove the defective design of the product at the time it was manufactured." *Estate of Spinosa v. International Harvester Company*, 621 F.2d 1154, 1160 at No. 5 (1st Cir. 1980).

As this Court noted in its Opinion, the Eighth Circuit, alone among all the circuits has consistently found Rule 407 to be inapplicable in strict products liability cases. However, the Eighth Circuit's stalwart stance appears to be wavering in light of the rejections of its holding by the majority of the circuits. In McGowne v. Challenge-Cook Bros., Inc. 672 F.2d 652,665 (8th Cir. 1982), the court reversed judgment in favor of the defendant on grounds of an erroneous instruction. The court went on to address various evidentiary issues raised by the appellant,

including the trial court's exclusion of evidence of post-accident warning notices placed on the product by the manufacturer. The Court stated:

> "This assignment of error raises questions in a developing and changing field of law. If these questions recur on retrial, they must be determined on the *then* controlling legal principles and decisions."

[Emphasis added]. The court then goes on to note the decision in *Cann, supra*, in contrast to the court's own decision in *Farner v. Paccar, Inc.*, 562 F.2d 518 (8th Cir. 1977).

This Court's decision is based in part upon the inapplicability of the policy reasoning behind Rule 407. Underlying the Rule is the desire to encourage tort feasors to take steps to remedy hazardous conditions. The exclusion of evidence of subsequent remedial measures, therefore, permits tort feasors to make such changes without the fear of such evidence being used against them in subsequent lawsuits. This Court notes that:

> "...it is unrealistic to think a tort feasor would risk innumerable additional lawsuits by foregoing necessary design changes simply to avoid the possible use of those modifications as evidence by persons who have already been injured."

(*Herndon* Opinion at p. 10). If the policy reasoning underlying Rule 407 is "unrealistic," then it should not be applied in any case, including negligence cases. This Court's Opinion in essence guts Rule 407. The distinctions relied upon by the Court in finding Rule 407 inapplicable in strict liability cases do not in fact exist. The Court consistently relies upon the difference between negligence and strict liability, in that in a negligence case a jury must focus upon the defendant's conduct, while in a strict liability case, the jury must focus on the product itself. But as the Fourth Circuit noted in *Werner, supra*,

> "It makes no difference to the defendant on what theory the evidence is admitted; his inclination to make subsequent improvements will be similarly repressed. The reasoning behind this asserted distinction we feel to be hypertechnical, for the suit is against the manufacturer, not against the product."

Werner, supra, 628 F.2d at 857. If this Court recognizes the validity of Rule 407 at all, it must recognize the policy reasoning which compelled Congress to adopt it. In turn, the Court must recognize that the policy encouraging tort feasors to remedy hazardous conditions applies with equal force to a manufacturer accused of negligence as to a manufacturer sued in strict tort liability.

As an additional ground for affirmation, this Court notes that the trial court excluded as cumulative Airworthiness Directives issued by the Federal Aviation Administration which would have instituted the same change mandated by Service Bulletin 527. Piper respectfully submits that the cumulative effect of the Airworthiness Directives was not the basis for the trial court's exclusion of them as evidence. In the course of the argument as to the Airworthiness Directives' admissibility, the court expressed concern over the investigative basis for the directives, to which the plaintiffs' attorney replied:

> "I think they are largely founded upon Piper's findings, your Honor, because Piper has gone out and told the FAA that we have received reports...Piper has made their own investigation."

[Tr. Vol. II, p. 113]. In excluding the Airworthiness Directives, the court cited Rule 403 and stated that the prejudice of the directives outweighed their probative value, and indicated a concern that there was "no investigative strength behind the ADS other than the bulletins." [Tr. Vol. II, p. 116]. It is thus clear that the court in its discretion would not have admitted the Airworthiness Directives even had it excluded Service Bulletin 527. The court's statements indicate that it questioned the trustworthiness of the Airworthiness Directives themselves. In addition, the changes outlined in Service Bulletin 527 were not required by a superior authority. Service Bulletin 527 was itself a mandatory directive [Tr. Vol. V, p. 24].

In relying upon the Airworthiness Directives' admissibility under Rule 407, this Court again relies upon the policy reasoning underlying Rule 407; that is, the encouragement of subsequent remedial measures. If a superior authority requires the measures, the policy does not apply. However, it was Piper who initially made the mandatory changes. The Federal Aviation Administration's subsequent adoption of Piper's own remedial measures

does not eliminate the evils sought to be avoided by Rule 407. Pursuant to the policy reasoning of Rule 407, had Piper known that its service bulletin would be used against it in a strict products liability case. it may have refrained from making those changes and from issuing Service Bulletin 527. In such a situation, the Airworthiness Directives directing Piper to make such changes would clearly be admissible under Rule 407. However, in the instant case , Piper's taking the initiative in instigating the changes in the first place constitutes the very behavior sought to be encouraged by Rule 407.

For the foregoing reasons, Piper respectfully petitions this Court for a rehearing, and suggests that the rehearing be held in banc.

Respectfully submitted,

CIVEROLO, HANSEN & WOLF, P.A.

By /s/ Cynthia A. Fry

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CERTIFICATE OF MAILING

The undersigned hereby certifies that she mailed the original and three copies of the Petition for Rehearing to Howard K. Phillips, Clerk, United States Court of Appeals for the Tenth Circuit, C404 United States Courthouse, 1929 Stout Street, Denver, Colorado 80294; and mailed two copies to Robert P. Smith, Attorney, 601 Broadway, Suite 400, Denver, Colorado 80203, this 16th day of September, 1983.

/s/ Cynthia A. Fry

Cynthia A. Fry